Bureau of Competition Policy

Statement

LUNCHEON ADDRESS

BY

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BUREAU OF COMPETITION POLICY

TO THE CANADIAN BAR ASSOCIATION

COMPETITION LAW SECTION

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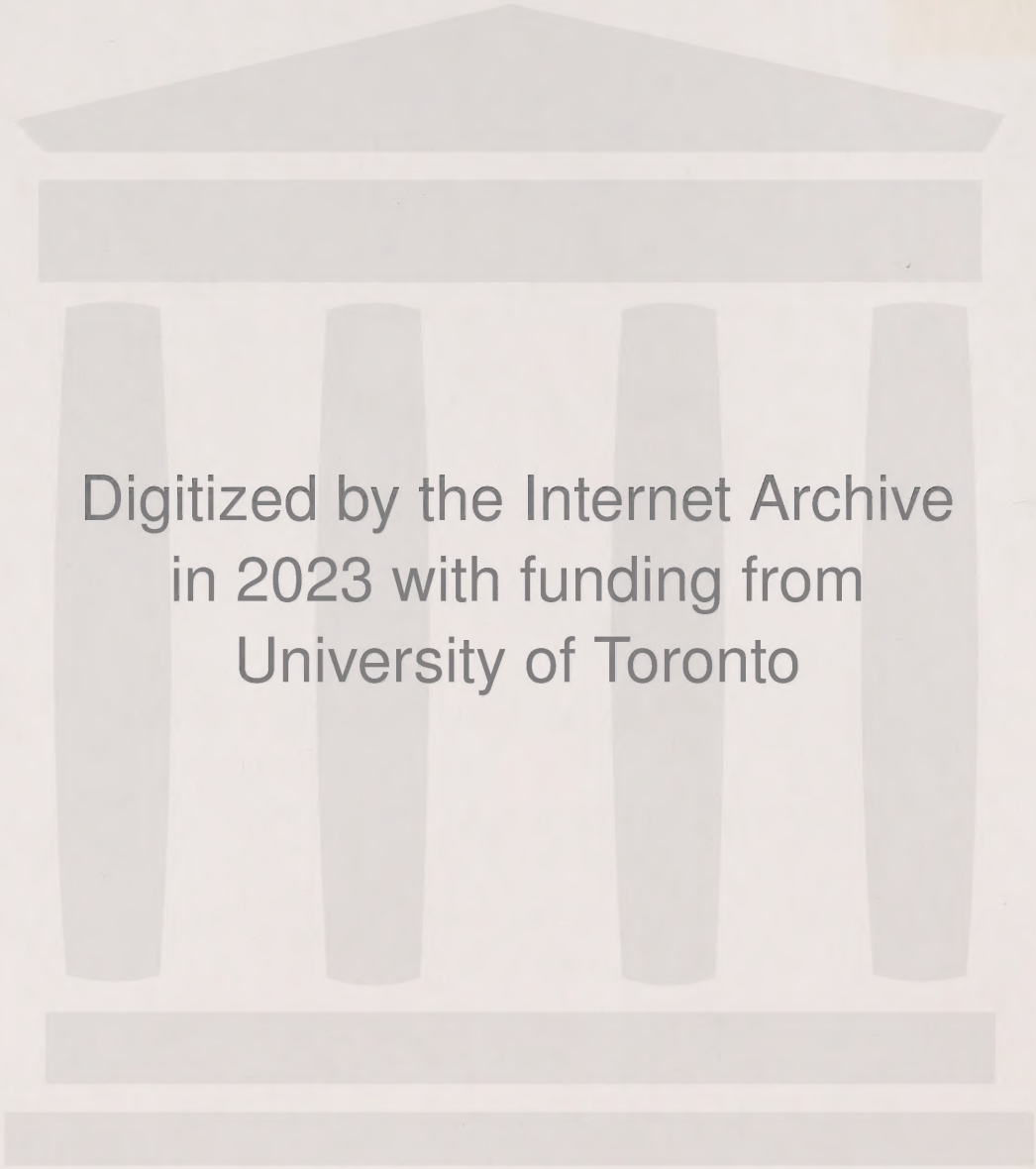

Let me begin by saying that I am glad to have this opportunity to address the second annual conference of the National Competition Law Section of the Canadian Bar Association. It is, I believe, indicative of the growing importance of competition policy in Canada that so many of us are here today. Conferences provide an opportunity for a full and frank discussion of important issues affecting competition policy such as those we are addressing today. In addition, they give me an opportunity to understand the issues and hear the concerns of competition law practitioners. Of course, they also provide a vehicle for the Director's message.

Since the passage of the *Competition Act* in 1986, each Director has stressed the importance of compliance with the law, not out of a blind devotion to following the rules, but because compliance fosters a dynamic market economy. Today, the importance of competition to the economy has become accepted, not just by economists, but by business, consumers and government. One result of that development has been that compliance with the *Competition Act* is being actively promoted by the Bar to their clients. Ten years ago, Canadian companies with a competition law compliance program were almost unheard of; today it is becoming the norm. In my view, this is a direct result of the ongoing dialogue and partnership between the legal and business communities and the Bureau. It signals to me that there is probably a need to communicate the Bureau's views on the features of compliance audits and internal compliance programs which I consider to be relevant enforcement considerations.

Six weeks ago, I had the opportunity to speak at the National Canadian Bar Association meetings in Toronto. At that time, my remarks dealt with how the Bureau is fulfilling its mandate in an era of resource constraint, and the way that the relationship between the Director and Attorney General of Canada contributes to more effective enforcement of the *Competition Act*. This afternoon, I would like to review some of the developments of the past year and discuss what the Bureau will likely be doing in the year ahead.

The Past

In preparing today's address, I thought it would be a good idea to review the commitments I made at the inaugural conference of the Section, in Vancouver in

October 1993. I think that you will agree that we have essentially delivered on those commitments. During the course of the past year, my office has:

1. released a draft information bulletin on the treatment of confidential information under the *Competition Act*, which we have discussed in some detail today;

2. released a draft information bulletin on the Bureau's enforcement policies in respect of strategic alliances;

3. launched the Public Education and Information Program to enhance awareness of the *Competition Act* and the Bureau in the small and medium-size business communities;

4. developed innovative public education products dealing with the marketing practices provisions of the *Act*; and

5. developed a draft set of internal guidelines for the use of officers in developing sentencing advice and recommending fines to the Attorney General of Canada in criminal competition matters.

Last year, I intervened in the CRTC's Telecommunications Regulatory Framework proceeding (CRTC 92-78) to make representations favouring the replacement of rate of return regulation with a price cap regime as well as the exercise by the Commission of its regulatory forebearance powers under the new *Telecommunications Act*. The Commission rendered a very pro-competitive decision just a few weeks ago. The first steps toward competition in local service, market driven pricing and the removal of regulatory barriers in interactive media have been taken by the Commission. The decision also accepts the principle that regulatory forebearance even in the presence of residual market power can enhance economic welfare. The Bureau's analysis of market power, as set out in the *Merger Enforcement Guidelines*, I was pleased to see, was reflected in the decision.

Not that the CRTC and the Bureau always see eye to eye. The Commission gave no weight to the Bureau's representations in its recent licensing decision on direct to home broadcast satellite services. Earlier this month, the government announced a review of the policies which led to the Commission's decision. I am optimistic that this development will open the way to competitive delivery of home broadcast satellite services.

On the enforcement front, a review of the past year's activities demonstrates that we have had a solid track record of results. From January to September 1994, charges have been laid by the Attorney General in four matters, three cases have been committed to trial after preliminary hearings and 13 prosecutions are underway. Convictions were registered in two out of three cases[1] since January. A new feature that I have pursued on two recent occasions in criminal enforcement involves the use of the interim injunction powers in section 33 of the Act.[2]

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1. Roberts Real Estate Ltd. (now 41813 Alberta Ltd.), a real estate broker in Calgary, was convicted on one count of price maintenance and fined $25,000 in March 1994 by the Court of Queen's Bench of Alberta; Jo-Ad Industries and Western Air Conditioning were each acquitted on one count of bid-rigging in March 1994 by the Ontario Court (General Division); and convictions and fines were registered against Kanzaki Specialty Papers Inc., Mitsubishi Corporation and Mitsubishi Canada Limited under the conspiracy, foreign directives and price maintenance provisions of the Act.

2. In *Attorney General of Canada v. Luxottica Canada Inc. et. al.* (Federal Court, Trial Division, File No. T-1460-94) on June 28, 1994 the Attorney General sought an interim injunction under section 33(1) requiring nine respondents to supply a retailer of eyeglasses damaged as result of alleged price maintenance activities. The Court declined to issue an interim injunction at that time. However, it issued an order requiring the respondents to comply with the *Competition Act* and set out a timetable for the examination of affiants and the production and examination of affidavits by the respondents in advance of a hearing on the Attorney General's application under section 33(1). As of this date, the Court has not heard the matter. A number of motions have been made to quash or vary the order.

   In *Attorney General of Canada v. David Oppenheimer and Associates et. al.* (Federal Court of Appeal, File No. A-367-94) an interlocutory injunction was issued on August 8, 1994 under section 33(1) prohibiting the continuation of an agreement, entered into by three western Canadian brokers of Australian mandarin oranges with their Australian suppliers, to prevent or lessen competition unduly in the purchase, sale and supply of Australian mandarin oranges in Western Canada. The injunction will remain in force until proceedings are initiated and completed by the Attorney General under section 34(2) of the *Act*.

I would also like to use this opportunity to correct the notion that the only criminal competition offences the Bureau pursues involve conspiracy and bid-rigging. Over the past year, I have initiated a number of price maintenance inquiries, and several matters are with the Attorney General, or are before the courts.[3]

In misleading advertising matters, charges in 20 matters have been laid since January, 17 cases have been referred to trial and 45 prosecutions are underway. Convictions were registered in 15 misleading advertising cases.

Two applications have been filed with the Competition Tribunal under the abuse of dominant position provisions. In April of this year, I filed an application with the Competition Tribunal under the abuse provisions of the Act relating to certain business practices of the A.C. Neilsen Company of Canada. On September 20, 1994, I filed the first consent order application before the Competition Tribunal under the abuse provisions in respect of certain restrictive business practices of yellow pages publishers. It is also the first application to address joint dominance as well as the first consent order application before the Competition Tribunal since Imperial Oil Ltd./Texaco Canada Inc. in 1989.

While no merger matters are currently before the Competition Tribunal, since January the Mergers Branch has reviewed 113 transactions which have not posed any significant competition concerns, 45 matters were ongoing as of September 1st, and three transactions have been abandoned by parties as a result of competition concerns identified by the Bureau.

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3. For example, *Supra* Note 1, Roberts Real Estate Ltd.; price maintenance charges were laid by the Attorney General in the Ottawa Retail Gasoline inquiry in January 1994; a preliminary hearing in respect of price maintenance charges against four corporations and one individual relating to the supply of replacement auto parts in Québec is scheduled to start in March 1995; price maintenance charges against Ultramar Canada Inc. and an Ultramar employee were withdrawn at a trial in April 1993 in the Court of Queen's Bench of the Province of New Brunswick. Predatory pricing as well as conspiracy charges have also been laid in the *Sherbrooke Driving Schools* inquiry which is proceeding to trial.

Of course, there are a number of cases that warrant specific comments. The Gemini proceedings were important for two reasons. The outcome before the Competition Tribunal preserved competition in domestic airline markets by removing the possibility of Air Canada controlling the Canadian market by default. Second, the case demonstrated that matters before the Competition Tribunal can proceed quickly and efficiently even in very complex and hotly contested litigation. Compared to reported waiting times in civil litigation before the regular courts, the Gemini proceedings are all that much more remarkable.

On the criminal side, charges were laid in January 1994 under the price maintenance provisions in the Eastern Ontario Retail Gasoline inquiry. Roberts Real Estate Ltd., a real estate broker in Calgary, was convicted of price maintenance in March 1994 for discriminating against a competing discount real estate broker. Also the first convictions and fines under the foreign directives provisions of the Act were registered in the past year in the insecticides case.[4]

A few practitioners in the audience may have noticed that the Bureau now routinely conducts searches of computer systems authorized under section 16 of the *Competition Act* when executing search and seizure powers. Over the past year or so, we have dedicated significant time and resources to training officers in computer system search techniques, acquiring the appropriate software, and developing links with other law enforcement agencies with expertise in the area. The capability to search computer systems is an absolute and on-going requirement in today's business environment. I might add that earlier this month, a motion to quash a search of a computer system was summarily dismissed in the Ontario Court of Justice, General Division, and the Court confirmed the use of search software as an appropriate investigative tool.

I have spoken on several occasions in the recent past of the need for greater international co-operation within the boundaries of the law in order to effectively

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4. Chemagro Limited pleaded guilty and was fined $1.25 million and $750,000 for its role in foreign directed and domestic conspiracies relating to the supply of insecticides for forest protection in Canada in June 1993. Sumitomo Canada Limited was fined $1.25 million for foreign directed conspiracy in the same matter in November 1993.

combat anti-competitive activity. The value of such co-operation was clearly demonstrated in the recent fax paper case. This was the first joint antitrust investigation carried out by Canadian and United States agencies to yield convictions. Kanzaki Specialty Papers Inc. and Mitsubishi Corporation and Mitsubishi Canada Limited, suppliers of thermal facsimile paper to industry and consumers, were convicted and fined for conspiracy in both countries.[5] Our success in the fax paper inquiry can be directly attributed to the effectiveness of the *Mutual Legal Assistance Treaty in Criminal Matters* and to our close working relationship with the Antitrust Division of the United States Department of Justice.

Co-operation encompassed the exchange of information and mutual assistance in each other's investigation, including joint witness interviews and depositions, and co-ordinated execution of formal powers. The case officers on the fax paper inquiry did an outstanding job with their counterparts in Washington. It sets the stage for a positive approach to phase two of this ongoing joint investigation.

Just last week, I announced that Canadian and American law enforcement agencies agreed to explore increased co-ordinated enforcement action against cross-border deceptive and fraudulent telemarketing practices. The announcement followed the first-ever joint session involving the Bureau, a delegation from the U.S. Federal Trade Commission, led by its Chairman, Janet D. Steiger, and representatives of other Canadian law enforcement agencies participating in Project

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5. Kanzaki Specialty Papers Inc. and Mitsubishi Corporation pleaded guilty to one count of conspiracy. Mitsubishi Canada Limited pleaded guilty to one count for its participation in a foreign directed conspiracy in Canada. Mitsubishi Canada Limited and Mitsubishi Corporation also pleaded guilty to one count of price maintenance. Kanzaki and Mitsubishi each were fined $950,000 in July and August 1994 respectively.

   The Antitrust Division of the United States Department of Justice secured convictions under section 1 of the Sherman Act and total fines of just over $6 million (U.S.) against Kanzaki, various Mitsubishi companies and others.

Phonebusters.[6] I should add that areas under consideration will extend beyond sharing case related information as we intend to explore advancing mutual assistance and enforcement techniques.

The Future

What do I see ahead in the coming year? Certainly, more co-operation with American and other foreign anti-trust agencies. Indeed my counterparts in two other OECD countries have requested that we begin working toward information sharing and mutual assistance. In the new global economy, antitrust agencies and competition authorities are going to be pursuing more and more cases where cooperation and coordination will be necessary to ensure healthy and competitive markets. We are currently pursuing joint investigations with agencies in five competition cases and several marketing practices matters. There will be more cases like fax paper and insecticides. International cooperation is here to stay, it is going to intensify, and it is going to yield results.

One of my top priorities is to expand enforcement cooperation between agencies, primarily through bilateral agreements. In addition, I intend to continue to promote "soft harmonization," -- greater convergence and coherence of underlying principles, statutory rules, enforcement practices across jurisdictions. Greater harmonization also reduces the cost of doing business where firms operate in a number of jurisdictions, and enhances market transparency in foreign markets. The latter is particularly important to Canada because trade accounts for such a large proportion of our national income.

This past summer the Clinton administration put the *International Antitrust Enforcement Assistance Act* before Congress. The proposed legislation would allow the United States government to negotiate reciprocal agreements with other countries to enhance enforcement assistance and information sharing in both

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6. Agencies participating in Project Phonebusters include the Bureau of Competition Policy, the Royal Canadian Mounted Police, the Ontario Provincial Police, the Metropolitan Toronto Police and the Ontario Ministry of Consumer and Commercial Relations.

criminal and civil matters. For some time now, the Bureau has been reassessing our cooperative instruments with the United States antitrust authorities, notably the 1984 MOU. When the MOU was conceived in 1984, it was designed to reduce the potential for inter-jurisdictional conflicts by providing notification when antitrust activity may affect the interests of the other country. The world has changed since 1984: globalization, CUSTA, NAFTA and the successful conclusion of the GATT Uruguay Round have deepened Canada's economic relationship with the United States. These developments will inevitably increase the extent of bilateral cooperation with the United States and Mexico.

I am optimistic that a draft agreement on competition policy between Canada and the European Union will move ahead over the coming year. The formal conclusion of the agreement has been on hold as a result of France's legal challenge of the 1991 United States-European Union agreement on competition policy on a question of the Commission's jurisdiction. This matter has recently been resolved, and the Canadian as well as the United States-European Union agreements should proceed to the European Union Council of Ministers for approval in the near future.

One commitment I made at the CBA meetings last year that has yet to be fulfilled is securing larger fines in conspiracy and bid-rigging offences. Larger fines, against both corporations and individuals, and imprisonment for egregious offences, are necessary to promote compliance with the *Act*. I like to think of this as a work-in-progress. Over the next few months, several important conspiracy cases will be at trial. I am optimistic that if the Crown prevails, the courts will impose sentences that will have the appropriate deterrent effect.

In the area of civil reviewable matters, proceedings before the Competition Tribunal in both the A.C. Neilsen Company of Canada and Yellow Pages applications should be completed before the end of the year. Other applications under the abuse provisions may be expected to proceed in the near future. The Bureau will also stay at the forefront of the regulatory agenda, particularly telecommunications. The CRTC's decision in the Regulatory Framework hearings clearly demonstrate the importance of competition advocacy work. The

convergence of telecom and broadcast technologies -- i.e. the "information highway" -- will also command increasing attention.

I will also be examining our experience with merger review after eight years with the new *Act*, and more than three years' experience with the *Merger Enforcement Guidelines*. There is little doubt that the Mergers Branch is reviewing transactions more efficiently now, and that the quality of many briefs from the Bar has improved significantly. Obviously, with an expected increase in general merger activity, this is mutually beneficial. I have a group of officers examining the MEGs and expect to issue a supplement in the next year or so. The analytical framework, analysis of market definition, market power and efficiency considerations, and the underlying philosophy will not change; rather, I expect to elaborate on certain topics which may not have been dealt with in the MEGs. A number of process issues in merger review will also be addressed.

For example, divestiture resolutions in merger matters have not always been effective, particularly in regard to private undertakings with the Bureau where the parties to the transaction were required to divest after the merger transaction had closed. Some of the problems identified include failure to designate a viable business or asset package for divestiture, failure to divest to a competitive entity and, third, failure to divest in a timely fashion. Consent order and "fix-it-first" divestitures, while imperfect, typically have fared better.[7]

As a result, I hope to revitalize consent order proceedings before the Competition Tribunal, and to standardize the terms and conditions of divestiture orders. Many of these terms and conditions were reflected in the March 1993

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7. Consent orders: *Canada (DIR) v. Asea Brown Boveri Inc.* (June 15, 1989); Canada (*DIR) v Air Canada et. al.*, (July 7, 1989); and *Canada (DIR) v. Imperial Oil Ltd.*, (January 26, 1990). Merger matters resolved by way of preclosing divestitures: Nestlé Enterprises Limited/ Nabisco Brands Canada Ltd. and General Foods Inc. (August 18, 1987); Nabisco Brands Canada Ltd./Interbake Foods Division of George Weston Limited and Les Aliments Culinar Inc. (February 1, 1988) and Hostess Food Products Limited/Frito-Lay Division of Pepsi Cola Canada Ltd. and Murphy's Snack Foods (November 16, 1988).

order of the Competition Tribunal requiring divestiture by Southam Inc. of acquired publications in the North Shore of Vancouver.[8]

The submission of more substantive information by merging parties and counsel is another area where I believe that further improvements in the merger review process can be made. Too many briefs submitted by counsel are still subjective, do not provide or refer to company documents, nor identify potential sources of additional information such as the names of customers. As a further measure to enhance the quality of information upon which assessments are based, the Mergers Branch, under the new Senior Deputy Director of Investigation and Research, Francine Matte, has adopted a general policy that parties are now requested to respond to information requests under oath. I am also prepared to apply to the Courts for the use of formal powers, if necessary, in appropriate merger inquiries. Recently, we used formal powers in the enforcement of the other civil reviewable matters under the Act in select cases when the voluntary approach did not work.

This approach is a reflection of the fact that it has been the Bureau's experience in contested merger proceedings[9] that important information and documents requested on a voluntary basis at the review stage were produced only with the compulsion of discovery. Also, information supplied under oath generally has been more complete and accurate than the responses to voluntary information requests.[10] While we all value the voluntary approach traditionally followed in

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8. In March 1993, the Competition Tribunal stayed this order pending Southam Inc.'s appeal of an earlier decision in this matter. The Federal Court of Appeal will hear argument in February 1995 on the Bureau's appeal of the Competition Tribunal's June 1992 decision which dismissed other parts of the application in respect of Southam Inc.'s acquisition of Lower Mainland Publishing Ltd.

9. *Canada (DIR) v Air Canada et al*, commonly referred to as Gemini I which resulted in a Competition Tribunal consent order issued July 7, 1989; *Canada (DIR) v Hillsdown Holdings (Canada) Limited*; and *Canada (DIR) v Southam Inc. et. al.*

10. Information was supplied under oath as if an order under section 11 of the Act was issued in the Maple Leaf Mills Limited/Ogilvie Mills Ltd. and the Merlin Gerin (Canada) Ltee/Square D Company inquiries.

such matters, I am concerned about the number of instances where we have subsequently determined that we were not provided with all relevant information. I should add that there will be situations where third parties, typically competitors of the parties proposing a merger, will also be asked to respond to information requests under oath. Sophisticated competitors occasionally tailor their views on merger proposals with an eye on the merger's potential price effects. While some might interpret the above as a sea-change, in reality it will affect only the few problematic transactions the Bureau examines in detail each year. Analysis and discussions will be more focused and factually sound. It is also more operationally cost-effective and efficient.

At last year's CBA meetings in Vancouver, I stressed the importance of the Bureau's dialogue with the Bar, particularly the National Competition Law Section. I would like to conclude my remarks by offering my thoughts on how to enhance the value of our relationship.

At the risk of appearing argumentative, familiar territory for lawyers, I would like to see a few adjustments in the relationship. Firstly, there is the issue of lawyers requesting meetings with the Director. The Bureau is part of a new department that is in the process of reviewing its programs and clarifying its mission. The Bureau has to participate in the process, I personally have to be involved, and this places considerable demands on my time. International priorities -- NAFTA, OECD, bilateral obligations and initiatives -- are also making increasing demands on my time. I can assure you I am not indifferent to your issues and concerns, but it is unrealistic for you to expect that I will be able to personally meet with you and your clients on each issue that you bring to the Bureau. We have a very capable and experienced management team and a strong complement of seasoned officers. I place considerable responsibility and trust in my staff. Many of you have excellent working relationships with the management and staff of the various branches, and I would encourage all of you to continue to build good working relationships with all areas of the Bureau. I do follow the progress of significant cases quite closely. I will, of course, meet with lawyers and their clients when appropriate, but perhaps not as frequently as some of you might like.

I also believe that it is vital that the competition Bar should get more involved in the public policy debates and discussions on the major competition policy issues of the day. Otherwise its influence will wane, to the detriment not only of the profession, but of the public as well. By this I do not mean that the Bar should stop advocating their clients' interests or meekly agree with every position taken by the Bureau. What I do mean is that these issues should be seen as important, as areas for pro-active, not just reactive, involvement. In addition, any input to Bureau initiatives or policy proposals needs to be timely and realistic, recognizing the context within which proposals are being made.

For example, I must tell you that I was disappointed with the Section's input on cost recovery. While several practitioners provided very thoughtful commentary early on, delivery of the Section's response to the Bureau's consultation paper took quite a bit longer than expected. Moreover, the Section's response was rather technical, and adrift from the current fiscal realities in the federal government. You should be aware that the proposed *Department of Industry Act* was introduced in Parliament on September 19, and it contains provisions to enable cost recovery. Once the legislation is passed, I intend go ahead with cost recovery, and it will likely involve more Bureau products and services, and higher fees than those initially proposed in 1993. I recognize that cost recovery was the first consultation initiative by the Bureau to be addressed by the Section and so there were some start-up problems. Our relationship is evolving and enduring well. I am confident that future consultations will be more timely and will consider the broad public policy implications involved.

This past Summer, I received a submission from the Media and Communications Law Section of the CBA dealing with the intrepretation of "sale price" in section 52(1)(d) of the misleading advertising provisions. I believe the Competition Law Section has this submission, and your thoughts and commentary on it would be most welcome. Again, I think this is another area where the Section could have a positive influence, not only on our thinking, but on the understanding of competition policy in broader areas of the legal and business communities.

The Competition Law Section has the potential to make an important contribution to the public policy debate on competition policy in Canada. Obviously, not every idea and recommendation of the Section will be put into practice; other views and objectives are also involved. The appropriate accommodation and balance of ideas and interests ultimately results in sound public policy. Recently, I initiated consultations on confidentiality and strategic alliances. In the next year or so, I intend to issue a supplement to the *Merger Enforcement Guidelines*. There may be other policy initiatives as well where I will be needing your input. For instance, Minister Manley recently asked me if I was satisified with the *Act*. It is not unusual for a Minister to make such an inquiry of his officials; indeed, I believe that it is the responsibility of those charged with the responsibility of enforcing legislation to consider the effectiveness of the law on an ongoing basis. The competition Bar has a wealth of experience and insight to contribute to this ongoing effort. I welcome any thoughts you may have on this or any other questions of significance to you or your clients.

Thank you.

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